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No. 99-658

In the Supreme Court of the United States

JAIME CASTILLO, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the type of firearm used or carried by an offender during and in relation to a predicate offense was a sentencing factor, rather than an element of the offense, under the version of 18 U.S.C. 924(c) in effect at the time of petitioners' offenses.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 144a-162a) is reported at 179 F.3d 321. An earlier opinion of that court (Pet. App. 1a-116a), affirming petitioners' convictions and remanding for resentencing on one count, is reported at 91 F.3d 699. The opinions of the district court on remand (Pet. App. 165a-169a) and in connection with the original sentencing (Pet. App. 119a-141a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 1999. Petitions for rehearing were denied on July 28, 1999 (Pet. App. 163a-164a) . The petition for a writ of certiorari was filed on October 15, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Western District of Texas, each petitioner was convicted of using and carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1). Petitioners Castillo, Branch, Avraam, and Whitecliff were also convicted of voluntary manslaughter of federal officers, in violation of 18 U.S.C. 1112 and 1114. Petitioner Craddock was convicted of possessing an unregistered destructive device, in violation of 26 U.S.C. 5861(d). Petitioners Castillo, Branch, Avraam, and Whitecliff were sentenced to consecutive terms of 10 years' imprisonment for manslaughter and 30 years' imprisonment for the firearms offense, to be followed by five years of supervised release. Petitioner Craddock was sentenced to consecutive terms of 10 years for the firearms offense and 10 years for possession of a destructive device, to be followed by five years of supervised release. Petitioners Castillo, Branch, Whitecliff, and Craddock were fined $2000 each, petitioner Avraam was fined $10,000, and together petitioners were ordered to pay $1.1 million in restitution. The court of appeals affirmed. Pet. App. 1a-116a (original appeal), 144a-162a (appeal after remand for resentencing on firearms convictions).

1. On February 28, 1993, agents of the Bureau of Alcohol, Tobacco, and Firearms (ATF) attempted to execute an arrest warrant for Vernon Howell, also known as David Koresh, and a search warrant for a large compound known as Mount Carmel outside Waco, Texas. Koresh was the leader of the Branch Davidians, a religious sect that resided at the compound. At daily Bible studies, Koresh taught that the Branch Davidians would be "translated" into heaven following an apocalyptic confrontation with outsiders, to whom he referred as "the beast" and "the enemies." Koresh instructed the Branch Davidians to prepare for the final battle, and preached that "if you can't kill for God, you can't die for God." The group fortified the Mount Carmel compound, and built a large stockpile of weapons and ammunition, in anticipation of a violent confrontation with the outsiders. Pet. App. 2a-3a; Gov't C.A. Br. 4-10.[1]

The ATF agents arrived at Mount Carmel in two cattle trailers. After several agents alighted and approached the entrance, gunfire erupted from the compound's front doors and windows. Pet. App. 4a; Gov't C.A. Br. 15-16, 18-28. Around the same time, three National Guard helicopters flying toward the rear of the compound (to create a visual diversion) turned back after they were hit by gunfire from the compound. Pet. App. 4a; Gov't C.A. Br. 17-18. The ensuing gun battle between ATF agents on the ground and occupants of the compound lasted nearly two hours and claimed the lives of Agents Steven Willis, Conway LeBleu, Todd McKeehan, and Robert Williams. Twenty-two other agents were wounded. Pet. App. 4a; Gov't C.A. Br. 28-30, 33-40.

Although a cease-fire was negotiated, Koresh and many of the Branch Davidians refused to leave the compound. Agents of the Federal Bureau of Investigation (FBI) then surrounded the compound and engaged in extended negotiations with Koresh. Koresh instructed the Branch Davidians to open fire if agents attempted to enter the compound. On April 19, 1993,

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[1] "Gov't C.A. Br." refers to the government's brief in the court of appeals in connection with petitioners' first set of appeals (Fifth Circuit No. 94-50437).

after a 51-day stand-off, the agents attempted to induce the compound's remaining occupants to leave by flooding the compound with tear gas. Around noon, however, fire broke out in the compound. Most of those remaining in the compound died in the fire or from gunshot wounds. Pet. App. 4a, 68a-69a, 121a; Gov't C.A. Br. 42-55.

2. As relevant to the firearms convictions at issue here, the evidence at trial showed that petitioner Castillo retrieved his AR-15 assault rifle and joined Koresh and several other Branch Davidians at the front doors of the compound when ATF agents first arrived on February 28. When the gun battle began, Castillo tried to chamber a round in his rifle, but it jammed. He then retrieved a pistol from his room and went down the hall to another room on the first floor. Marjorie Thomas, a Davidian who testified for the government at trial, saw Castillo with a gun at the end of the corridor on the second floor. After the cease-fire was declared, Castillo retrieved an AK-47 assault rifle from the kitchen and stood guard at the kitchen door. When ATF agents were allowed into the interior courtyard to rescue a severely wounded agent, he briefly pointed his rifle at one of the agents. During the stand-off, he stood guard with an AK-47 in his room on the first floor. Castillo escaped from the compound during the fire on April 19, and Texas Rangers found a hand grenade in the assault vest that he took off after he left the burning building. Pet. App. 59a-61a, 67a, 69a, 71a-72a; Gov't C.A. Br. 15, 44-46, 51-52, 65-66, 125.

Petitioner Whitecliff shot at the helicopters that approached the compound at the beginning of the confrontation on February 28. During the stand-off he was armed with an FN-FAL .308 caliber rifle, and stood guard in the compound chapel with Thomas and petitioner Branch. Thomas overheard Whitecliff tell Castillo, Branch, and another resident that he had shot an agent during the gun battle. Whitecliff left the compound on March 19, during the stand-off. Pet. App. 61a-62a, 67a, 69a, 71a; Gov't C.A. Br. 40-41, 44-46, 64.

Petitioner Branch shot a rifle at ATF agents from rooms on the second floor of the compound during the gun battle on February 28. Victorine Hollingsworth, a Davidian who testified for the government, heard Branch exclaim, during the gun battle, "He nearly got me and I got one." Kathryn Schroeder, also a Davidian and government witness, heard Branch running around and yelling in the hallway on the first floor during the gun battle. During the stand-off, Branch stood guard in the chapel with Thomas and petitioner Whitecliff, armed with an M-1A .308 caliber rifle. Thomas overheard Branch tell Castillo, Whitecliff, and another resident that he had shot an agent during the battle. Branch, like Whitecliff, left the compound on March 19. Pet. App. 58a-59a, 67a, 69a, 71a; Gov't C.A. Br. 31, 33, 40, 44-46, 63-64, 123-124.

Petitioner Avraam also participated actively in the February 28 battle, firing a rifle at ATF agents from the gymnasium on the right rear side of the compound. During the stand-off, Avraam stood guard in the areas above the gym and chapel, armed with a .50 caliber rifle. He escaped from the compound during the fire on April 19. After his arrest, Avraam told a fellow inmate that while in the compound he had had a fully automatic weapon. Pet. App. 57a-58a, 67a, 69a, 72a; Gov't C.A. Br. 44-45, 51-52, 66, 124.

Petitioner Craddock learned on the morning of February 28 that there might be a confrontation with ATF agents. Craddock changed into black clothing, retrieved his AR-15 assault rifle, and loaded his 9 mm.

handgun, but Koresh told him to stay in his room. During the stand-off, Craddock stood guard in Schroeder's bedroom on the first floor, carrying both the AR-15 and the handgun. After escaping from the compound during the fire on April 19, Craddock admitted to Texas Rangers that Koresh had given him a hand grenade that morning. The Rangers found a live grenade in the cinder block building where Craddock took refuge when he escaped. Pet. App. 68a, 69a; Gov't C.A. Br. 12-14, 44-45, 51, 53, 72, 125.

3. Petitioners were charged with, among other crimes, conspiring to murder federal officers, in violation of 18 U.S.C. 1117, and using and carrying firearms during and in relation to that conspiracy (a "crime of violence"), in violation of 18 U.S.C. 924(c)(1). Pet. App. 4a-5a. The district court instructed the jury that in order to find a defendant guilty under Section 924(c)(1), it must find "[t]hat the Defendant under consideration committed the crime alleged in Count One of the Indictment," which was the conspiracy to murder. Jury Instructions 48; see Pet. App. 5a.[2] The instructions defined the term "firearm" to mean "any weapon which will or is designed to or may readily be converted to expel a projectile by the action of an explosive." Jury Instructions 48. The jury acquitted each petitioner on the conspiracy count, but found each guilty of the firearms offense. Pet. App. 6a; Tr. 7405-7406.

In sentencing petitioners on the firearms convictions, the district court observed that 48 machineguns (many

[2] The district court's instructions to the jury were not fully transcribed. See Tr. 7043-7044, 7364-7366. The written instructions that were distributed and read to the jury were filed and made part of the record.

equipped with silencers), four live hand grenades, and numerous grenade fragments were retrieved from the ruins of the Mount Carmel compound and vehicles immediately surrounding it. Pet. App. 124a-125a. The court noted that each of the defendants "stood guard [during the stand-off], with order[s] to fire should the FBI agents attempt entry"; that "[n]umerous witnesses testified to the use of automatic weapons during the February 28th firefight with ATF agents"; and that the testimony to that effect was corroborated by an expert's identification of "fully automatic weapon fire on the video recordings made on that date." *Id.* at 125a.[3]

The court found that the evidence "established the existence of not only a figurative but a literal fortress, manned by each of the [petitioners]," and that each petitioner had either "actual or constructive possession of the numerous fully automatic weapons and hand grenades present in the Compound before February 28,

[3] Thirteen ATF agents testified that they heard fully automatic gunfire coming from the compound during the battle on February 28. Tr. 1297, 1300-1301 (Ballesteros); 1744-1748 (Curtis); 1956-1958 (Mayfield); 1999-2000 (Richardson); 2067-2068, 2074-2075 (Champion); 2141-2143 (Alexander); 2220-2224 (Sprague); 2330-2331 (Petrilli); 2404-2405, 2409-2410 (Shiver); 2514-2515 (Cohen); 2689-2690 (Buford); 3116 (Chisholm); 3624-3625 (Appelt). A reporter who arrived on the scene shortly after the agents also testified that he heard fully automatic gunfire at the compound. Tr. 6561-6562. A local sheriff's officer testified that he heard automatic gunfire over the telephone when he answered a 911 call from the compound during the battle. Tr. 6514-6515. An FBI expert who reviewed the soundtrack of a videotape of parts of the gun battle testified that some sounds on the tape were consistent with automatic gunfire (Tr. 6124, 6128-6129), and that 48 of the weapons recovered from the compound after the April 19 fire had been modified to fire in fully automatic mode (Tr. 1169-1171, 1175-1177, 1179-1180, 1182-1183, 1187).

1993, and through the 51 day siege." Pet. App. 124a. In addition, the court explained (*id.* at 122a) that "[b]y its verdict convicting the [petitioners] of violating Section 924(c)(1), the jury found that they were members of a conspiracy to murder federal agents." The evidence established that three members of the conspiracy (including petitioners Avraam and Craddock) actually possessed a machinegun or destructive device between February 28 and April 19, and that "the use of fully automatic weapons, and probably grenades and silencers, was foreseeable and foreseen by all" the conspirators. *Id.* at 126a-127a. For sentencing purposes, the court held, each petitioner "should be held accountable under *Pinkerton* [v. *United States*, 328 U.S. 640 (1946)] for using and carrying machineguns, destructive devices and silencers during their conspiracy to murder federal officers." *Id.* at 126a.

At the time of petitioners' offenses, Section 924(c)(1) provided that a defendant convicted of using or carrying a firearm during and in relation to a crime of violence should be "sentenced to imprisonment for five years, and if the firearm is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, to imprisonment for ten years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years," the sentence in each case to run consecutively to that imposed for any other crime, including the predicate crime of violence. 18 U.S.C. 924(c)(1) (1994); see Pet. App. 170a-171a. The district court rejected (*id.* at 127a-134a) petitioners' argument that it could not impose a 30-year sentence under that provision in the absence of a jury finding that the offense involved a machinegun, destructive device, or silencer, holding instead (*id.* at 129a-130a) that the type

of "firearm" used or carried in violation of the statute was a sentencing factor, "not an element of the offense." Accordingly, based on its conclusion that petitioners shared responsibility for the use and carrying of machineguns and grenades in relation to their conspiracy, the court concluded that each petitioner was subject to a 30-year sentence under Section 924(c)(1). *Id.* at 126a-127a, 134a.[4]

4. The court of appeals affirmed petitioners' convictions, including those under Section 924(c)(1). Pet. App. 1a-116a; see *id.* at 63a-73a. As relevant here, the court rejected the claim that petitioners could not be convicted of using or carrying firearms during and in relation to a conspiracy to murder, when the jury had acquitted them on the conspiracy count itself. *Id.* at 65a. The court observed that "[t]he record is replete with evidence of a conspiracy to murder federal agents and each individual [petitioner's] membership in that conspiracy." *Ibid.*; see *id.* at 65a-70a. Likewise, the court found "overwhelming" evidence "that each of the five [petitioners] 'used' a firearm" within the meaning of Section 924(c) (*id.* at 71a), and did so "during and in relation [to]" the conspiracy (*id.* at 72a).

The court also rejected petitioners' argument that the type of firearm used or carried was an offense

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[4] The court imposed 30-year terms on petitioners Castillo, Branch, Avraam and Whitecliff, consecutive to their 10-year sentences for manslaughter. 6/16-17/94 Tr. 222-223 (Castillo), 226 (Branch), 227 (Avraam), 229 (Whitecliff). Although it held that petitioner Craddock was subject to the same sentence under Section 924(c), the court "depart[ed] downward" in his case and imposed only a 10-year sentence, consecutive to a 10-year sentence for possession of a grenade. *Id.* at 230-232; Pet. App. 79a, 146a & n.2. The government did not challenge Craddock's sentence on appeal. See Pet. App. 79a.

element, rather than a sentencing factor, under the applicable version of Section 924(c)(1). Pet. App. 78a-85a. Relying on the statute's structure and history, the court concluded that Congress did not intend to create separate offenses when it amended Section 924(c) to provide for stiffer penalties in cases involving certain types of weapons. *Id.* at 81a, 85a. Accordingly, "[t]he Government need not charge in the indictment nor must the jury find as part of its verdict the particular type of firearm used or carried by the defendant." *Id.* at 85a.

The court agreed with petitioners, however, that the sentences imposed under Section 924(c) could not stand to the extent they rested only on the district court's finding that each petitioner had "actual or constructive possession" of the machineguns and grenades present in the Davidians' compound. Pet. App. 85a-86a. The court explained that under this Court's intervening decision in *Bailey* v. *United States*, 516 U.S. 137 (1995), the government must prove "active employment" of a firearm in order to satisfy the "use" element of Section 924(c)(1). Pet. App. 86a. Although there was "evidence from which it could be found that machineguns and other enhancing weapons were used by one or more members of the conspiracy," the court noted that "[w]ith *Bailey* the district court must take another look and enter its findings regarding 'active employment.'" *Ibid.* It accordingly vacated the sentences imposed under Section 924(c), and remanded for resentencing on that count. The court made clear that if the district court "[s]hould * * * find on remand that members of the conspiracy actively employed machineguns, it

[would be] free to reimpose the 30-year sentence." *Ibid.*[5]

5. After this Court denied review, 520 U.S. 1185 (1997), the district court reconsidered petitioners' sentences under Section 924(c) in accordance with the court of appeals' mandate. See Pet. App. 165a-169a. Reviewing the evidence in light of *Bailey*, the court found that petitioners Branch, Castillo, Craddock and Avraam each personally used or carried "enhancing weapons" during and in relation to the conspiracy. *Id.* at 167a.[6] The court noted that there was "no direct evidence that [petitioner] Whitecliff personally used or carried an enhancing weapon," but it reiterated that "[m]ore than a preponderance of the evidence clearly

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[5] The court also concluded that the district court did not err in refusing to instruct the jury on self-defense and defense-of-another (Pet. App. 8a-30a); that the jury's finding of guilt on the firearms count could stand, despite its acquittal on the conspiracy count (*id.* at 31a-38a); that the district court did not abuse its discretion by according the jurors limited anonymity (*id.* at 38a-44a) or by admitting some of petitioner Castillo's post-arrest statements into evidence while excluding others (*id.* at 45a-56a); that the evidence was sufficient to sustain the manslaughter convictions (*id.* at 56a-63a); and that the district court properly applied the Sentencing Guidelines (*id.* at 86a-98a). Judge Schwarzer, sitting by designation, dissented with respect to the self-defense instruction, the exclusion of portions of Castillo's statement, and the sufficiency claim, but not with respect to the issues raised by the present petition. *Id.* at 98a-116a. See also Br. for the United States in Opp., *Castillo* v. *United States*, 520 U.S. 1185 (1997) (Nos. 96-989, et al.) (denying review of court of appeals' first decision).

[6] The court found that Branch had been seen firing an automatic weapon from the second floor of the compound; that Avraam had admitted carrying and using an automatic weapon during the gun battle; that Castillo had a live grenade on his person when he escaped from the compound on the day of the fire; and that Craddock also carried a grenade that day. Pet. App. 167a-168a.

demonstrates that many members of the conspiracy fired, brandished, displayed *and* carried fully automatic machine guns and hand grenades during the period of the conspiracy," and that "those acts were foreseeable and foreseen by each [petitioner]." *Id.* at 168a-169a; 9/4/97 Tr. 33. Relying, accordingly, in part on its previous discussion of responsibility for coconspirators' acts under the *Pinkerton* doctrine, see Pet. App. 125a-127a, the court reimposed the same sentences that it had originally imposed under Section 924(c)(1). *Id.* at 169a.

6. The court of appeals affirmed. Pet. App. 144a-162a. Of primary relevance here, the court declined to revisit its previous holding that the type of firearm used or carried was a sentencing factor, not an offense element, under former Section 924(c)(1). *Id.* at 151a-155a.

The court rejected (Pet. App. 154a) petitioners' contention that its position was inconsistent with this Court's intervening decisions in *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998), and *Jones* v. *United States*, 526 U.S. 227 (1999). It noted that its treatment of the sentencing-factor issue on petitioners' earlier appeal "accord[ed] with the directive in *Almendarez-Torres* * * * to look at 'language, structure, subject matter, context, and history' in determining whether or not Congress intended for a statute to define a separate crime." *Ibid.* (quoting *Almendarez-Torres*, 523 U.S. at 228). As to *Jones*, the court concluded that there "the legislative history contained conflicting indications of whether Congress intended for * * * the statute at issue[] to lay out three distinct offenses or a single crime with three maximum penalties," whereas "the legislative history of § 924(c)(1) discloses that Congress consistently referred to the machine gun clause as a

penalty and never indicated that it intended to create a new, separate offense for machine guns." *Ibid.* The court declined to consider petitioners' new arguments based on the doctrines of "constitutional doubt" and lenity, observing that petitioners' did not advance those arguments on their first appeal, and had not shown that failure to consider them belatedly would lead to "plain error." *Id.* at 151a, 155a.[7]

ARGUMENT

Petitioners contend (Pet. 8-21) that the type of firearms they used or carried during and in relation to their conspiracy to murder federal officers should have been construed as an offense element, rather than a sentencing factor, in the version of 18 U.S.C. 924(c)(1) under which they were convicted. That contention does not warrant review by this Court.

At the time petitioners committed their offenses, Section 924(c)(1) provided:

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[7] The court of appeals also "decline[d] to reconsider" (Pet. App. 157a, 160a) either its previous holding that petitioners could be convicted under Section 924(c) even though they had been acquitted of conspiracy to murder, or its "prior approval of the district court's application of the *Pinkerton* doctrine" (*id.* at 160a) for purposes of sentencing. *Id.* at 155a-157a, 158a-160a. In light of the latter determination, the court did not address petitioners' contentions that the district court clearly erred in finding, on remand, that petitioners Branch, Avraam, Castillo and Craddock personally used or carried machineguns or hand grenades, and in relying on conduct after February 28 in resentencing Castillo and Craddock. *Id.* at 160a n.16. The court held that petitioners had waived any objection to the jury instruction on "use" of a firearm (*id.* at 157a-158a) or to the district court's use of a preponderance standard in finding facts relevant to sentencing (*id.* at 160a-161a). In this Court, petitioners challenge only the court of appeals' construction of former Section 924(c)(1). See Pet. i.

> Whoever, during and in relation to any crime of violence or drug trafficking crime * * *, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence * * *, be sentenced to imprisonment for five years, and if the firearm is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, to imprisonment for ten years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years.

That language sets out "two distinct conduct elements— * * * the 'using and carrying' of a gun and the commission of a [crime of violence or drug-trafficking crime]." *United States* v. *Rodriguez-Moreno*, 526 U.S. 275, 280 (1999); see also *Bailey* v. *United States*, 516 U.S. 137, 142-143 (1995) ("Section 924(c)(1) requires the imposition of specified penalties if the defendant, 'during and in relation to any crime of violence or drug trafficking crime. . ., uses or carries a firearm.'"); *Smith* v. *United States*, 508 U.S. 223, 228 (1993) (same). Thus, a straightforward analysis of the statutory language and structure indicates that Congress intended the *type* of "firearm" involved in the crime to be a factor relevant to determination of the proper sentence, not to guilt or innocence of the offense.

As the court of appeals explained in its first opinion in this case, the history of Section 924(c)'s original enactment and periodic amendment also supports that construction of the statute. Pet. App. 81a-83a; see *United States* v. *Eads*, 191 F.3d 1206, 1214 (10th Cir. 1999), petition for cert. pending, No. 99-6907 (filed Nov. 1, 1999); *United States* v. *Alborola-Rodriguez*, 153 F.3d 1269, 1272 (11th Cir. 1998), cert. denied, 119 S. Ct. 1809

(1999); *United States* v. *Shea*, 150 F.3d 44, 51-52 (1st Cir.), cert. denied, 525 U.S. 1030 (1998); compare *Almendarez-Torres* v. *United States*, 523 U.S. 224, 234 (1998) (noting that legislative history of 8 U.S.C. 1326 "contains no language at all that indicates Congress intended to create a new substantive crime"). Moreover, in its most recent opinion, the court below specifically considered the effect of this Court's intervening decision in *Jones* v. *United States*, 526 U.S. 227 (1999). In light of the distinctive legislative history of Section 924(c), however, the court found no conflict between *Jones* and its prior decision, and it accordingly declined to reconsider its previous determination that under former Section 924(c)(1), "the type of firearm used or carried [was] a sentencing [factor], and not an element of the offense." Pet. App. 154a-155a.[8]

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[8] Petitioners argue (Pet. 8-21) that *Jones*'s discussion of the doctrine of "constitutional doubt" requires the conclusion that type-of-firearm should have been treated as an offense element under former Section 924(c)(1). In *Jones*, however, the Court discussed "constitutional doubt" only after it had examined the language and history of 18 U.S.C. 2119, as well as comparable federal and state statutes, and reached at least a tentative conclusion as to the proper construction of the statute. See 526 U.S. at 239; see also *Almendarez-Torres*, 523 U.S. at 238 (rule of doubt applies only if statute is "genuinely susceptible to two constructions after, and not before, its complexities are unraveled" using ordinary interpretive techniques, including consideration of legislative history); cf. *United States* v. *Jones*, 194 F.3d 1178, 1185-1186 (10th Cir. 1999) ("Because Congressional intent is evident from the plain language of [21 U.S.C. 841], the doctrine of constitutional doubt, and in particular the constitutional doubt articulated in *Jones*, does not apply."); *United States* v. *Williams*, 194 F.3d 100, 105-107 (D.C. Cir. 1999) (*Jones* does not permit reconsideration of circuit precedent interpreting 21 U.S.C. 841).

As petitioners point out (Pet. 21-27), the Ninth Circuit has reached a contrary conclusion. *United States* v. *Alerta*, 96 F.3d 1230, 1235 (9th Cir. 1996) ("If the 30-year consecutive sentence is to be imposed under [former] Section 924(c)(1), the fully automatic character of the firearm * * * is an element of the crime.").[9] That conflict does not, however, warrant resolution by this Court. In 1998, Congress substantially revised Section 924(c), which now makes clear (in subsection (c)(1)(B)) that Congress intends the type of firearm involved in the offense to be treated as a sentencing factor, rather than as an element of the offense defined by subsection (c)(1)(A). See 18 U.S.C. 924(c)(1) (Supp. IV 1998); cf. *Jones*, 526 U.S. at 232 ("[S]ome statutes come with the benefit of provisions straightforwardly addressing the distinction between elements and sen-

[9] Petitioners also seek to rely on *United States* v. *Sims*, 975 F.2d 1225, 1235-1236 (6th Cir. 1992), cert. denied, 507 U.S. 932, 998, and 999 (1993), and *United States* v. *Melvin*, 27 F.3d 710 (1st Cir. 1994). See Pet. 22-24. The reasoning in *Sims* may be read to support petitioners' position, but the case held only that where one predicate crime is charged along with several related violations of Section 924(c), a court should merge the firearms counts either before or after trial. In *Melvin* the First Circuit explicitly reserved the question at issue here, 27 F.3d at 715 n.9, which it later resolved in favor of the government in *Shea*. The Fourth Circuit's unpublished decision in *United States* v. *Shepard*, No. 94-5307 (Mar. 22, 1995), see Pet. 24-25, held only that the district court *could* impose an enhanced sentence where the jury *had* found that the defendants used or carried a sawed-off shotgun. The Second Circuit similarly had no occasion to address the present question in *United States* v. *Rodriguez*, 53 F.3d 545, cert. denied, 516 U.S. 893 (1995), see Pet. 25, because the district court in that case submitted to the jury the question whether the defendant's firearm was "equipped with" a silencer for purposes of Section 924(c)(1). See *United States* v. *Rodriguez*, 841 F. Supp. 79, 81 (E.D.N.Y. 1994).

tencing factors.").[10] In light of that change in the statute, the question whether the previous version of Section 924(c), under which petitioners were convicted and sentenced, is best construed to treat the type of firearm as an element of the offense or as a sentencing factor is a matter of no prospective importance, and does not warrant consideration by this Court.[11]

[10] The 1998 amendment also changes the sentences specified in Section 924(c)(1) from fixed terms of years to statutory *minimum* sentences. Compare, *e.g.*, 18 U.S.C. 924(c)(1) (1994) ("shall * * * be sentenced to imprisonment for five years, * * * and if the firearm is a machinegun, * * * to imprisonment for thirty years") with 18 U.S.C. 924(c)(1)(A)(i) (Supp. IV 1998) ("not less than five years") and (c)(1)(B)(ii) (Supp. IV 1998) ("not less than 30 years"); see also 18 U.S.C. 924(c)(1)(C)(ii) (Supp. IV 1998) (prescribing life sentence if second or subsequent conviction involves a machinegun or destructive device).

[11] Petitioners suggest (Pet. 29-30) that the court below somehow "exacerbate[d]" the circuit conflict concerning the construction of former Section 924(c)(1) by sanctioning the use at sentencing of principles of co-conspirator responsibility derived from *Pinkerton* v. *United States*, 328 U.S. 640, 645-648 (1946). Given the district court's factual findings, on remand for resentencing, that petitioners Branch, Avraam, Castillo, and Craddock each personally used and/or carried a machinegun or grenade, that court's reliance on *Pinkerton* made a difference only in the sentence imposed on petitioner Whitecliff. See Pet. App. 167a-168a. In any event, as the district court originally reasoned (*id.* at 122a), by finding petitioners guilty of violating Section 924(c)(1), the jury necessarily found that petitioners were members of a conspiracy to murder federal agents. See also *id.* at 65a ("The record is replete with evidence of a conspiracy to murder federal agents and each individual [petitioner's] membership in that conspiracy."), 125a-127a (district court's treatment of *Pinkerton* issues at original sentencing). Because the evidence was sufficient to sustain that finding, and because the predicate crime of violence supporting the conviction under Section 924(c) was a conspiracy, the courts below correctly concluded that, for purposes of sentencing, petitioners

Finally, we note that the court of appeals' construction of former Section 924(c)(1) raises the possibility of a different challenge, based on the constitutional question identified by this Court in *Jones*. See 526 U.S. at 239-252 & n.6. The Court recently granted review of a related question in *Apprendi* v. *New Jersey*, cert. granted, No. 99-478 (Nov. 29, 1999), which involves the constitutionality of a state "hate crime" statute that authorizes enhanced sentences on the basis of factual findings made by a judge, at sentencing, under a preponderance-of-the-evidence standard. See 99-478 Pet. i, 3-4.

Petitioners, however, have never argued that the version of Section 924(c)(1) that applies to them is unconstitutional as construed by the lower courts, and the petition in this case does not present that question. Pet. i; see Pet. 8-21 (arguing only that statute should be construed in light of "constitutional doubt").[12] The constitutional issue could not appropriately be raised for the first time now. See, *e.g.*, *Zobrest* v. *Catalina*

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bore joint responsibility for each others' use or carriage of particular weapons during and in relation to the conspiracy. Petitioners cite no conflicting decision of any court of appeals.

[12] Petitioners did not argue at the time of their initial sentencing that the Constitution requires any fact that increases a statutory maximum penalty to be treated as an offense element. Nor did they make that argument in their first set of appeals. See, *e.g.*, Pet. App. 78a-86a (addressing statutory arguments raised by petitioners). Petitioners first referred to the Fifth and Sixth Amendments in an earlier petition to this Court, and then only in the context of the argument, later refined and renewed before the court below (see *id.* at 151a-155a) and in the present petition, that former Section 924(c)(1) should be construed in light of the constitutional requirements of indictment and trial by jury. See 96-989 Pet. 25-26 (*Castillo* v. *United States*, cert. denied, 520 U.S. 1185 (1997)).

Foothills School District, 509 U.S. 1, 8 (1993); *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).[13] Nor is that question of any future relevance in the context of Section 924(c)—which, as noted above, has been amended so that what could formerly have been characterized as graduated statutory maximum penalties are now clearly statutory *minimum* sentences, with an implicit statutory maximum of life imprisonment. See note 10, *supra*; *McMillan* v. *Pennsylvania*, 477 U.S. 79 (1986) (upholding imposition of minimum sentence based on statutory sentencing factor). There is accordingly no reason to hold this petition pending the Court's

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[13] At a minimum, any constitutional claim would now be reviewable only for plain error. See *United States* v. *Williams*, 194 F.3d at 107 (reviewing for plain error a post-*Jones* challenge to constitutionality of drug sentencing under 21 U.S.C. 841); see generally *Johnson* v. *United States*, 520 U.S. 461, 465-466 (1997); *United States* v. *Olano*, 507 U.S. 725, 732-733 (1993). In light of *Jones*'s own caution in expressing its constitutional concerns (see 526 U.S. at 243 n.6 ("our concern about the Government's reading of the statute rises only to the level of doubt"), 251 n.11 ("our decision today does not announce any new principle of constitutional law")), any constitutional error involved in enforcing Section 924(c) in accordance with its (former) terms cannot plausibly be characterized as "plain." Nor, given the evidence at trial (see pp. 4-8 & note 3, pp. 11-12 & note 6, *supra*), could petitioners demonstrate that failure to treat firearm type as an offense element in this case has "affected substantial rights" or resulted in a "miscarriage of justice" that would "seriously affect the fairness, integrity or public reputation of judicial proceedings." *Olano*, 507 U.S. at 734, 736; see *Johnson*, 520 U.S. at 469-470 (pretermitting remainder of "plain error" analysis where evidence of guilt was overwhelming); see also *Neder* v. *United States*, 119 S. Ct. 1827, 1838-1839 (1999) (applying harmless error rule where court failed to charge jury on element of offense).

consideration of the constitutional question presented in *Apprendi*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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